Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling	)	
Obligations of Incumbent Local	)	CC Docket No. 01-338
Exchange Carriers	)	

OPPOSITION OF THE UNITED STATES TELECOM ASSOCIATION, SBC COMMUNICATIONS INC., THE VERIZON TELEPHONE COMPANIES, BELLSOUTH CORPORATION, AND QWEST COMMUNICATIONS INTERNATIONAL INC. TO JOINT EMERGENCY PETITION FOR STAY OF ORDER

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OPPOSITION TO JOINT EMERGENCY PETITION FOR STAY OF ORDER

Pursuant to 47 C.F.R. § 1.45(d), the United States Telecom Association, the Verizon telephone companies, SBC Communications Inc., BellSouth Corporation, and Qwest Communications International Inc. oppose the Joint Emergency Petition for Stay of the Commission's Second Report and Order ("Order") in this docket.[1] The Order replaces the "pick-and-choose" rule — a rule that has for eight years posed an almost insurmountable roadblock to meaningful negotiations over interconnection agreement terms — with an "all-or-nothing" rule that requires CLECs to opt-in to existing interconnection agreements, if at all, in their entirety.

The Commission's elimination of the pick-and-choose rule drew on support from all sectors of the industry. The ILECs supported the rule change in order to allow them finally to engage in meaningful negotiations — with all the give-and-take that such negotiations entail — free from the danger that isolated "gives" would be obtained by other parties without the accompanying "takes." Several facilities-based CLECs also supported the Commission's determination, noting that the pick-and-choose rule was only rarely used and stressing that its

[1] *See* Second Report and Order, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 04-164 (rel. FCC July 13, 2004) ("Order"). Although the Joint Emergency Petition for Stay Pending Judicial Review ("Petition") was dated August 3, 2004, it was not filed with the Commission until August 4, rendering this response timely under Commission Rule 1.45(d).

elimination will allow them "to negotiate mutually beneficial concessions with incumbent LECs [that will] facilitate innovative business strategies." Order ¶ 13. And numerous state commissions likewise endorsed a change in the rules that would free parties to negotiate in a meaningful, mutually productive manner.

Against this chorus of supporters stand petitioners — a handful of CLECs, apparently wedded to the heavily regulated, "largely standardized" agreements (*id.* ¶ 12) that presently characterize the local telecommunications marketplace, which seek to stay the Order and thereby forestall ILECs and CLECs alike from engaging in the meaningful negotiations that all five Commissioners have emphasized are so important to the future of local competition.[2] Petitioners fall far short, however, of meeting the demanding standards for such extraordinary relief.

Petitioners' showing on the merits is wholly implausible. Petitioners rest their claim predominantly on the contention that the plain language of 47 U.S.C. § 252(i) mandates the pick-and-choose rule and forecloses the Commission from adopting the all-or-nothing rule. Incredibly, however, petitioners do not even acknowledge, much less attempt to rebut, the key statutory phrase on which the Commission relies to show ambiguity. Moreover, petitioners' reliance on the plain language is refuted by the Supreme Court's express invitation to the Commission to employ its "expertise" in determining "whether the [pick-and-choose rule] will significantly impede negotiations." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 396 (1999). As the Commission observes (*see* Order ¶ 8), that invitation would have been wholly superfluous had the statutory text resolved the matter.

[2] *See* http://www.fcc.gov/commissioners/letters/triennial_review/ (collecting letters from Commissioners emphasizing, "with one voice," the importance of commercial negotiations "now more than ever").

Petitioners' challenge to the reasonableness of the Commission's decision is equally devoid of support. At bottom, the Order is based on the Commission's conclusion — thoroughly supported in the record — that the pick-and-choose rule created a substantial barrier to meaningful negotiations, and its realization that, with the rule eliminated and the barrier removed, negotiations will be more successful in the future. Petitioners provide no basis in the record to dispute the Commission's conclusion regarding the effects of the pick-and-choose rule, nor any basis in logic to dispute the Commission's determination that, with the rule eliminated, those effects will likely disappear. Their challenge on the merits is accordingly certain to fail.

Petitioners' showing on the equities is likewise without merit. Petitioners' claim of irreparable injury stands on their own prediction that, with the pick-and-choose rule eliminated, CLECs faced with expiring interconnection agreements will be less likely to negotiate successor agreements and thus more likely to engage in arbitration. But the Commission itself has already concluded — based on abundant evidence in the record — that elimination of pick-and-choose is likely to lead to *more* successful negotiations, and thus to *fewer* occasions to arbitrate. What is more, even if petitioners' prediction turns out to be right and the Order does in fact yield less successful negotiations, CLECs can still avoid arbitration entirely simply by opting in to an entire agreement. Indeed, as petitioners acknowledge (at 16), that is precisely what most CLECs have done in the past, even when the pick-and-choose rule was in place.

On the other side of the coin, a stay would materially harm those parties — not just the ILECs, but also the CLECs and state commissions that voiced support for a change in the rules — that are interested in real negotiations, as well as the public that would benefit from more creative negotiations. Again, pick-and-choose impedes meaningful negotiations, thus preventing ILECs and CLECs alike from arriving at innovative, mutually agreeable solutions that will work

to their benefit and the benefit of the customers they serve. A stay would keep that barrier in place, to the detriment of ILECs and CLECs alike, as well as to the public interest.

DISCUSSION

Petitioners' request for a stay pending appeal is evaluated under the familiar test of *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921 (D.C. Cir. 1958), which requires the movant to make a "strong showing" of: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." Memorandum Opinion and Order, *Station KDEW(AM)*, 11 FCC Rcd 13683, 13685-86, ¶ 6 (1996); Order, *Implementation of Section 309(j) of the Communications Act — Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, 14 FCC Rcd 16511, 16515, ¶ 9 (1999). "A petitioner must satisfy each of these four tests in order for the Commission to grant a stay." Order, *Petition of the Connecticut Department Public Utility Control To Retain Regulatory Control of Wholesale Cellular Service Providers in the State of Connecticut*, 11 FCC Rcd 848, 853, ¶ 14 (1995). Petitioners have made no showing at all — much less a "strong" one — with regard to any of these factors.

I. PETITIONERS HAVE SHOWN NO LIKELIHOOD OF SUCCESS ON THE MERITS

The Commission had ample authority to replace the pick-and-choose rule with the all-or-nothing rule. Nothing in section 252(i) required the Commission to adopt pick-and-choose in the first place, and it is black-letter law that an agency may change course by "supply[ing] a reasoned analysis indicating that prior policies and standards are being deliberately changed." *Oxy USA, Inc. v. FERC*, 64 F.3d 679, 690 (D.C. Cir. 1995) (internal quotation marks omitted).

The Commission has persuasively done so here, and there is accordingly no question that its Order will be affirmed on review.

A. The Text of Section 252(i) Permits the All-or-Nothing Rule

Petitioners rest their challenge to the Order first and foremost on the plain language of section 252(i). Astonishingly, however, they simply ignore that provision's operative phrase. Section 252(i) provides:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier *upon the same terms and conditions as those provided in the agreement.*

47 U.S.C. § 252(i) (emphasis added).

The key phrase here is the one italicized above: "upon the same terms and conditions as those provided in the agreement." Order ¶ 7. As the Commission explained, that phrase is reasonably read to " 'indicate that an incumbent LEC would not be able to shield an individual aspect of a prior agreement from the reach of a subsequent entrant who is willing to accept *the terms of the entire agreement*.' " *Id.* (quoting *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 801 n.22 (8th Cir. 1997)) (emphasis added). That reading is plainly within the bounds of the statute — indeed, the Eighth Circuit, on review of the *Local Competition Order*,[3] previously adopted it as the *only* permissible reading. Petitioners' failure even to acknowledge the statutory language on which the Commission relies — much less to explain how it can possibly be considered foreclosed by the statute — is dispositive of their claim.

[3] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*"), *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), *decision on remand, Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *aff'd in part, rev'd in part sub nom. Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002).

Petitioners' plain-language argument is also squarely refuted by the Supreme Court's *Iowa Utilities Board* decision. There, in upholding the reasonableness of the pick-and-choose rule, the Court expressly declined to hold that an all-or-nothing construction of section 252(i) would be impermissible. *See Iowa Utils. Bd.*, 525 U.S. at 395-96. On the contrary, the Court endorsed the all-or-nothing rule, finding "eminently fair" the principle that "[a] carrier who wants one term from an existing agreement . . . should be required to accept *all* the terms in the agreement." *Id.* The Court also added that, while the pick-and-choose rule originally adopted by the Commission was "reasonable" and "the most readily apparent" from the text of section 252(i), *id.* at 396, it was "eminently within the expertise of the Commission" to determine that the all-or-nothing rule would better serve the purposes of the statute, *id.*

The Supreme Court thus held that the Commission has discretion to interpret section 252(i). Otherwise, the Court would not — indeed, could not — have left it open to the Commission, on the basis of its "expertise" (*id.*), to consider countervailing arguments for not imposing pick-and-choose and imposing instead the all-or-nothing rule. *See id.* at 397 ("Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency.") (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)). As the Commission explained, "it does not stand to reason that the Court would declare another possible interpretation of section 252(i), *i.e.*, the all-or-nothing rule, to be 'eminently fair,' but then restrict the Commission's discretion to only the pick-and-choose rule." Order ¶ 8 (quoting *Iowa Utils. Bd.*, 525 U.S. at 396). The Court's previous *Chevron* step two holding, therefore, "is not a finding that Congress clearly resolved the issue, and it le[ft] the Commission free to choose the other if reasonable." *Clinchfield Coal Co. v. Federal Mine Safety & Health Review Comm'n*, 895 F.2d 773, 778 (D.C. Cir. 1990) (holding

that agency may replace a previously affirmed reasonable interpretation of a statute with a different reasonable interpretation, even if a subsequent reviewing court were to "assume that the Commission's former view was the better one").[4]

Against all of this — the Commission's reasoned analysis, the Eighth Circuit's prior holding, and the Supreme Court's invitation to the Commission to apply its "expertise" — petitioners rely on the fact that the text of section 252(i) requires access to " '*any* interconnection, service, or network element provided under *an agreement*.' " Pet. at 10 (quoting 47 U.S.C. § 252(i)) (emphasis added). But the phrase on which petitioners stake their claim identifies only *what* must be made available under section 252(i); it says nothing about *the conditions under which* those services or elements must be made available. That latter question is what is at issue here, and it is answered by the phrase "upon the same terms and conditions as those provided in the agreement." As the Commission explained, and as petitioners do not seriously contest, that phrase is reasonably read to include *all* of the terms and conditions in the agreement, and thus comfortably permits the all-or-nothing rule adopted in the Order.[5]

[4] *See also Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 508 (1978) ("The authority of the Board to modify its construction of the Act in light of its cumulative experience is, of course, clear."); *Adelphia Communications Corp. v. FCC*, 88 F.3d 1250, 1255 (D.C. Cir. 1996) (upholding "about-face" where "the Commission provide[d] a reasoned analysis based upon its experience under the [prior rule]," which had "serve[d] the purpose of the statute less well" than originally anticipated); Order ¶ 8 n.33 (citing additional such cases).

[5] Petitioners rely (*see* Pet. at 9 & n.11) on a case in which the Supreme Court construed "any" in the statutory phrase "any other term of imprisonment" to encompass both state and federal sentences, but in that case "Congress did not add any language limiting the breadth of that word." *United States v. Gonzalez*, 520 U.S. 1, 5 (1997). Here, by contrast, the phrase "under the same terms and conditions" has such a limiting effect, as the Commission explained.

B. The Commission's Experience Under the Pick-and-Choose Rule Justifies Its Well-Reasoned Change to the All-or-Nothing Rule

Petitioners also challenge the reasonableness of the Order. They dispute the Commission's predictive judgment that the all-or-nothing rule will lead to more productive negotiations, arguing instead that their prediction — that the all-or-nothing rule will lead to less successful negotiations — was compelled by the record. *See* Pet. at 11-14. From the outset, however, this claim faces a steep uphill battle. The Commission's "predictive judgment" is "entitled to 'particularly deferential' review." *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999) (quoting *Milk Indus. Found. V. Glickman*, 132 F. 3d 1467, 1478 (D.C. Cir. 1998)); *see Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1468 (D.C. Cir. 1984) ("a reviewing court owes particular deference to the expert administrative agency's policy judgments and predictions"). The Commission need not be "confident to a metaphysical certainty of its predictions," *WorldCom, Inc. v. FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001), nor is "complete factual support in the record . . . possible or required," *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 814 (1978). Rather, it is enough for the Commission to make rational predictions that are not foreclosed by the evidence in the record. *See Fresno Mobile Radio*, 165 F.3d at 971; *Wold Communications*, 735 F.2d at 1468.

The Order easily satisfies that deferential standard. As the Commission properly recognized, the record firmly established that the eight-year experiment with the pick-and-choose rule had been a failure. "[B]ased on the record evidence," the Commission explained, "the pick-and-choose rule has 'significantly impede[d] negotiations . . . by making it impossible for favorable interconnection-service or network-element terms to be traded off against unrelated provisions.' " Order ¶ 12 (quoting *Iowa Utils. Bd.*, 525 U.S. at 396). Evidence provided by competitive and incumbent LECs alike, as well as state public utility commissions, demonstrated

that, with pick-and-choose in place, ILECs were unwilling to negotiate mutually advantageous terms, for fear that any concessions made on one provision would be seized upon by requesting carriers that would not have to take the corresponding term that warranted the concession in the first place.[6] The result, as many parties attested, was the "adoption of largely standardized agreements with little creative bargaining to meet the needs of both the incumbent LEC and the requesting carrier." *Id.*; *see also id.* ¶¶ 12-13 & nn.43-44, 49-50 (citing supporting comments of both CLECs and state commissions). The Commission thus reasonably decided to scrap the pick-and-choose rule, in the expectation that, by removing a major roadblock to successful negotiations, the Commission would create a climate conducive to negotiating mutually beneficial agreements.

The Commission's judgment on this matter, moreover, is borne out by the evidence in the record demonstrating that, in the eight years the pick-and-choose rule has been in place, CLECs have not often used it. *See* Order ¶ 21 & n.78. As one CLEC put it, " 'alternative negotiated terms based on perceived pick-and-choose rights are the exception rather than the rule.' " *Id.* (quoting PAETEC Comments at 2 (FCC filed Oct. 16, 2003)). The pick-and-choose rule, then, was all cost and little if any benefit: it substantially diminished ILECs ability to negotiate trade-

[6] Mpower, a CLEC that filed a petition in 2001 for modification of the pick-and-choose rule, explained to the Commission that, "[f]rom the standpoint of innovative and effective contracting," negotiations under the pick-and-choose regime are "reminiscent of the Gobi Desert." Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 17413, ¶ 722 (2003) (internal quotation marks omitted), *vacated in part and remanded*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *petitions for cert. pending, NARUC, et al. v. United States Telecom Ass'n, et al.*, Nos. 04-12, 04-15 & 04-18 (U.S. filed June 30, 2004); *see also* Order ¶ 4; *AT&T Communications of the Southern States, Inc. v. BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000) ("many so-called 'negotiated' provisions" arrived at with pick-and-choose in place "represent nothing more than an attempt to comply with the requirements of the 1996 Act").

offs between individual provisions in an agreement to reach mutually beneficial arrangements, yet provided the CLECs a tool, purportedly to make it easier to obtain interconnection agreements, that they used infrequently. Indeed, this evidence alone is reason enough to justify elimination of the rule.

Petitioners do not contest that, under pick-and-choose, there was virtually no creative bargaining between ILECs and CLECs, nor do they dispute that the goal of encouraging such creativity is a valid one. Instead, they question (at 13-14) the Commission's predictive judgment that the all-or-nothing rule will lead to more " 'creativity' in negotiations." In their view, ILECs to date "have shown no proclivity whatever to 'creativity' " with pick-and-choose in place, so it is unreasonable to expect them to do so under the all-or-nothing rule.

That reasoning is hopelessly circular — it relies upon the unfortunate results *created by* the pick-and-choose rule in order to justify its retention. The fact of the matter is that the dearth of creative bargaining exhibited to date is a direct result of the pick-and-choose rule. Recognizing that, the Commission reasonably removed that rule, and thereby removed the major impediment to negotiations. Petitioners' basic objection to that logical step — merely pointing at the problem, without taking account of the Commission's solution — is plainly insufficient to establish a likelihood of success on the merits.

Nor does petitioners' reliance (at 13) on ILECs' purported "bargaining power" demonstrate error in the Commission's approach. The Commission found that, "on balance, any hypothetical disadvantage in negotiating leverage is outweighed by the potential creativity in negotiation that an all-or-nothing rule would help promote." Order ¶ 14. As the Commission explained, ILECs will have "increased incentives to engage in meaningful give-and-take negotiations under an all-or-nothing rule" because they will no longer have to fear that another

carrier could opt into beneficial provisions of an agreement without having to make the same trade-off the original carrier made to get it. *Id.* On the other side of the ledger, the Commission properly recognized that any concerns regarding unequal bargaining power were mitigated by the 1996 Act's comprehensive nondiscrimination provisions. *See id.* ¶ 18. Indeed, the all-or-nothing rule itself gives CLECs a powerful tool to offset any perceived imbalance of power. As the Commission stressed, if a CLEC is dissatisfied with the pace or content of negotiations, it can simply opt-in to one of the many existing agreements under which other CLECs are providing service. *See id.* ¶ 19.

Petitioners dispute (at 14) the viability of that all-or-nothing approach, speculating that, without pick-and-choose, ILECs will include "poison pills" in agreements in order to discourage other carriers from adopting them. But, despite the fact that CLECs routinely opt-in to existing agreements and have been doing so for eight years, no party identified *any* evidence that any ILEC has ever attempted to include a poison pill in an agreement. In fact, the only evidence bearing on this issue relates to volume and term discounts that, as the Commission properly recognized, are "not discriminatory" and in no way undermine CLECs' opt-in rights. *See* Order ¶ 22. Furthermore, the Commission made clear that it would continue to monitor the industry, and that it stood ready to act to ensure that carriers do not use poison pills to "violate the antidiscrimination mandate of the Act." *Id.*

In the end, the Commission assessed the evidence and "conclude[d] that the benefits, in terms of protection against discrimination, of the pick-and-choose rule do not outweigh the significant disincentive it creates to negotiated interconnection agreements." *Id.* ¶ 24. The Commission then acted on that conclusion and established a regulatory structure that it predicts will better serve the goal of reaching mutually agreeable negotiated agreements between carriers.

That considered judgment, reached after careful weighing of the pros and cons of each rule, was eminently reasonable, and it will not be upset on appeal.[7]

II. BOTH THE PRIVATE EQUITIES AND THE PUBLIC INTEREST MILITATE STRONGLY AGAINST A STAY

Even if petitioners had succeeded in showing a likelihood of success on the merits, they would still not be entitled to a stay. A "party moving for a stay is required to demonstrate that the injury claimed is both certain and great." *Cuomo v. Nuclear Regulatory Comm'n*, 772 F.2d 972, 976 (D.C. Cir. 1985) (per curiam) (internal quotation marks omitted). Petitioners' conclusory allegations of injury fall far short of that exacting standard.

A. Petitioners base their claim of irreparable injury (which is grounded almost entirely on the affidavit of James Falvey on behalf of Xspedius) on the imminent expiration of numerous interconnection agreements. Absent the pick-and-choose rule, they say, negotiations are less likely to be successful and more likely to result in arbitration. The result, in petitioners' view, is that it will take longer, and cost more, to obtain successor agreements, thereby jeopardizing CLECs' right to existing reciprocal compensation revenues and forcing them to incur litigation costs. *See* Falvey Aff. ¶¶ 5-12; Pet. at 4-7.

That claim of injury fails on multiple levels. *First*, petitioners' prediction that the absence of pick-and-choose will hinder the process of negotiating new agreements is unsubstantiated and wrong. The Commission itself has already reached exactly the opposite conclusion, explaining that the pick-and-choose rule "is a *disincentive* to give and take in interconnection negotiations." Order ¶ 11 (emphasis added). Because the rule allows CLECs to

[7] Because the all-or-nothing rule is both reasonable and consistent with section 252(i), petitioners' argument (at 14-15) that the Commission failed to apply a forbearance analysis to justify deviating from section 252(i) is irrelevant. The Commission *revised* its pick-and-chose rule; it did not forbear from enforcing it. *See* Order ¶ 24 n.84.

take the sweet without the bitter, it "removes any incentive for ILECs to negotiate any provisions other than those necessary to implement what they are legally obligated to provide CLECs under the Act." *Id.* ¶ 13 (internal quotation marks omitted). The all-or-nothing approach, by contrast, "will restore incentives to engage in give-and-take negotiations while maintaining effective safeguards against discrimination." *Id.* ¶ 11 (internal quotation marks omitted). Contrary to petitioners' unsupported contention, the result of the Order will be more (and more productive) negotiations, yielding more mutually beneficial agreements and fewer cases requiring arbitration.

Second, even if petitioners were correct that negotiations were less likely to succeed under the Order, their claim of injury would still fail. Under the Order, if CLECs are unhappy with the results of negotiations under the all-or-nothing rule — and if they are unwilling to incur the delay and costs associated with arbitration — then they can still opt-in to entire existing agreements. In fact, that is what CLECs have typically done previously, even before pick-and-choose was eliminated. As petitioners themselves admit, "CLECs do not routinely use pick-and-choose." Pet. at 16 (citing Order ¶ 21 & n.78). Instead, those CLECs that do not want to negotiate an agreement from the ground up routinely opt-in to *entire* agreements. In Verizon's territory, for example, of the more than 3,600 existing interconnection agreements, more than 1,400 were opted into in their entirety, while only 73 were adopted by way of pick-and-choose.[8] Likewise, as the Commission notes, during the year ending September 30, 2003, approximately 59% of the agreements executed by SBC were adopted in full from existing agreements. *See* Order ¶ 21 n.78. Xspedius itself admits that it has opted-in to entire agreements in seven different states. *See* Falvey Aff. ¶ 5. The simple fact is that, contrary to petitioners' unsupported

[8] *See* Letter from Clint Odom, Federal Regulatory Advocacy Executive Director, Verizon, to Marlene H. Dortch, Secretary, FCC, Attach. at 4 (Apr. 21, 2004).

assertions, CLECs do not need the pick-and-choose rule to obtain interconnection agreements expeditiously and without engaging in arbitration.

Third, contrary to petitioners' argument, the *cost* of arbitrating successor agreements — in the event negotiations fail and the CLEC declines to opt-in to an existing agreement — cannot itself establish irreparable injury. *See* Pet. at 6. Even if those costs were to increase in the wake of the Order — and, as explained above, they will not — it is well established that "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974); *see, e.g.*, *I.A.M. Nat'l Pension Fund Benefit Plan A v. Cooper Industries, Inc.*, 789 F.2d 21, 25 (D.C. Cir. 1986) ("the cost and delay associated with modern-day litigation simply does not establish irreparable harm").

Nor, finally, is any of this analysis altered by the D.C. Circuit's *USTA II* decision. Petitioners appear to contend that *USTA II* will exacerbate the effect of the Order, insofar as it will lead to the simultaneous renegotiation (and, if necessary, arbitration) of numerous existing agreements. *See* Pet. at 4-5. But, contrary to petitioners' misleading suggestion, in the wake of *USTA II*, ILECs are not seeking to revise the *entirety* of their interconnection agreements. Rather, they are attempting to revise the portions of those agreements affected by *USTA II* — most significantly, the provisions that provide for unbundled access to mass-market switching, DS-1 and DS-3 loops, transport, and dark fiber. And, critically, the ILECs are doing so with respect to *all* of their existing agreements. Even under the pick-and-choose regime, CLECs could not opt-in to a provision of an agreement that itself had been declared invalid. Thus, even if the pick-and-choose rule were still available, CLECs could not rely upon it to short-circuit the negotiation process resulting from *USTA II*.

B. While petitioners' allegations of harm are thus "unsubstantiated and speculative," *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam), the countervailing equities strongly militate against a stay. For eight years, ILECs and CLECs alike have labored under the straitjacket imposed by pick-and-choose. Unable to engage in the robust negotiations contemplated by the 1996 Act — for fear that the results of such negotiations would be distorted through the application of pick-and-choose — ILECs have instead limited their offerings to those mandated by state and federal regulators. The result has been to encourage litigation of every conceivable interconnection agreement term, increasing costs and diverting attention from the primary aim of serving customers. The Order brings a long-overdue end to that regime, by allowing parties to negotiate mutually agreeable business solutions free from the disincentives created by pick-and-choose. A stay of the Order would only delay that result.

Petitioners counter that, because "CLECs do not routinely use pick-and-choose," ILECs have "little to fear if the rule remains in place." Pet. at 16. Quite apart from the fact that this admission thoroughly undermines petitioners' own claim of injury, it utterly misses the point. It is not the *actual* use of pick-and-choose that damages negotiations, but rather the *threat* of its use. As the Commission has found, ILECs "seldom make significant concessions in return for some trade-off for *fear* that third parties will obtain the equivalent benefits without making any trade-off at all." Order ¶ 13 (emphasis added). It is thus the mere presence of the rule, and the *possibility* that it will be employed, that forestalls meaningful negotiations. Indeed, the fact that CLECs have found little cause to employ pick-and-choose only proves that the rule inhibits real negotiations, inducing ILECs to reject any agreement language that might possibly be attractive to CLECs in isolation.

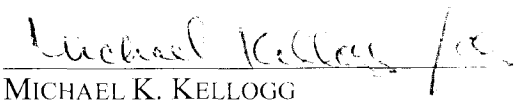
Petitioners also ignore the Commission's undisputed finding that the pick-and-choose rule "imposes material costs and delay" on ILECs, by forcing them continuously to gauge the likelihood that a single term will be plucked in isolation from a comprehensive agreement and by attempting to craft language preventing that result. *Id.* A stay would only ensure that these "material costs and delay[s]" continue unabated.

C. The public interest likewise counsels against a stay. As the Commission has found, the pick-and-choose regime has discouraged ILECs from agreeing to trade-offs in the past, resulting in "largely standardized agreements with little creative bargaining to meet the needs of both the incumbent LEC and the requesting carrier." *Id.* ¶ 12. The elimination of that rule will break the logjam, allowing ILECs and CLECs to engage in "the meaningful, give-and-take negotiations" expected by Congress and unanimously endorsed by the Commissioners. *Id.* ¶ 10. That result, in turn, will encourage all parties to arrive at agreements best suited to serve their customers, thereby furthering the advancement of local competition in the manner Congress intended. Petitioners' requested relief would thwart that result, overriding the Commission's reasoned judgment that the all-or-nothing rule will better serve the aims of the 1996 Act and accordingly delaying the further development of local competition. *See Coleman v. Paccar Inc.*, 424 U.S. 1301, 1308 (1976) (Rehnquist, J.) (vacating stay to avoid "imped[ing] Congress' intention to promote" statutory purpose "as expeditiously as is practicable").

CONCLUSION

The Commission should deny the Joint Emergency Petition for Stay.

Respectfully submitted,



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